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NO. 72-5125

IN THE

SUPREME COURT OF THE UNITED STATES

GLEN MILLER PERKINS, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO

BRIEF FOR RESPONDENT IN OPPOSITION

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_____ Term

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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE COUNTY OF SAN BERNARDINO.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

DECISIONS BELOW

The decisions below are adequately set forth in the petition for certiorari and the appendix thereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition for certiorari.

QUESTION PRESENTED

Whether a state court, pursuant to discretionary powers conferred upon it by state law, may, without infringing upon rights guaranteed by the Eighth, Ninth and Fourteenth Amendments, condition probation granted to a father of six illegitimate children born to five different women, who stands convicted of wilfully failing to provide necessary support for a minor child, upon an order not to procreate illegitimate children he is unable to support so that they become public welfare charges.

STATUTES INVOLVED

United States Constitution,
Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution,
Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution,
Fourteenth Amendment(§1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code Section 270
(Appendix A)

California Penal Code Section 1203.1
(Appendix B)

ARGUMENT

The question presented by this case is uniquely narrow. No amount of strained and tailored factual speculation can transform it into one justifying consideration by this Court on certiorari.

The probation order challenged by petitioner is a proper exercise of the court's discretion as conferred upon it by state law. It is an appropriate judicial effort to encourage petitioner who has demonstrated his propensity for promiscuous and irresponsible parenthood, to recognize his paternal obligations, and to henceforth confine his procreative efforts within a legally established familial relationship.

Neither Skinner v. Oklahoma, 316 U. S. 535, nor Griswold v. Connecticut, 381 U. S. 479, cited by petitioner, extends constitutional protection to the right to procreate beyond the marital relationship.

Nor, is the condition of probation complained of so vague and indefinite as to be repugnant to due process. The

restriction it imposes is set forth in clear language of common understanding. There is no room for speculation as to what conduct is enjoined. The only uncertainties arise not from the language defining the proscribed conduct, but from doing that which is conditionally prohibited--procreating illegitimate children.

Petitioner's contention that the condition constitutes "banishment" is so devoid of merit that it is frivolous.

The petition for certiorari presents no substantial question of federal importance, and should be denied.

I

THE CONDITION OF PROBATION IS A PROPER EXERCISE OF JUDICIAL DISCRETION CONFERRED BY STATE STATUTE

In California, probation is not an absolute right to which a person convicted of a crime is entitled. Rather, it is an act of clemency by the court, a privilege founded not upon any provision of the state or federal constitutions, but existing solely as a function of the statutes creating it. Cal. Pen. Code §§1203 et seq; People v. Miller, 186 Cal. App. 2d 34, 8 Cal. Rptr. 578 (1960).

California courts are vested with broad discretionary powers to impose restrictive conditions of probation. A court granting probation may impose any "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done...and specifically for the reformation and rehabilitation

of the probationer". Cal. Pen. Code §1203.1. A condition is only invalid if (1) it has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality. In re Bushman, 1 Cal. 3d 767, 83 Cal. Rptr. 375 (1970).

Petitioner stands convicted of wilfully failing to provide necessary support for a child, in violation of Section 270 of the California Penal Code. The record reveals that petitioner has fathered a total of six children, born to five different women, all out of wedlock. Under the condition of probation petitioner here seeks to invalidate, he is directed "Not to procreate any illegitimate children he is not able to support so that they become welfare

charges under the Aid to Families with Dependent Children Program". While in California, it is not unlawful to procreate illegitimate children, a father who wilfully fails to provide for his minor child, legitimate or illegitimate is subject to criminal prosecution. Cal. Pen. Code §270. The probation order petitioner complains of is not an absolute prohibition against his procreation of illegitimate children. It is conditioned upon petitioner's inability to support them. Its relationship to both the crime for which petitioner was convicted and to acts potentially criminal is clear.

The order also has a commendable rehabilitative thrust. By placing no limitations upon petitioner's right to father legitimate children, it encourages him to confine his procreative efforts to marriage.

II

NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED

A. The Condition Does Not Deny Petitioner Due Process or any Right Protected by the Ninth Amendment.

Petitioner contends that the condition of probation is unduly restrictive of his right to procreate and is therefore violative of the constitutional guarantees "protecting the dignity of man" contained in the Ninth and Fourteenth Amendments. In support of this contention, he cites Skinner v. Oklahoma, supra p. 5, and Griswold v. Connecticut, supra p. 5.

The contention is without merit. The cases cited are not controlling.

Skinner involved a state statute providing for surgical sterilization of persons determined to be habitual criminals as therein defined. It was struck down under the equal protection

clause of the Fouteenth Amendment because the definition of "habitual criminals" created unreasonable classifications of persons against whom the statute was applied. The instant case involves no such discrimination.

Moreover, once invoked, the restrictive effect of the statute invalidated in Skinner was complete and irreversible. The restriction imposed upon petitioner in the instant case is neither. The prohibition against procreating illegitimate children is conditioned upon his failure to support them so that they become public charges. No limitation is imposed upon his right to father legitimate children.

Most importantly, the scope of the protection afforded the right to procreate in Skinner did not extend beyond the marital relationship. The

Court discusses the right to marry and procreate as inseverable.

> "We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." (316 U. S. 535 at p. 541, emphasis added)

Likewise in Griswold, the object of the Court's concern was the marital relationship. There, a state law which defined the use of contraceptives as a criminal offense was invalidated as an unconstitutional invasion of the right of privacy of a married person.

Thus, the extent of the constitutional protection afforded the right threatened in both Skinner (to procreate) and Griswold (sexual privacy) does not reach beyond the marital relationship. No such relationship is visible in the present case.

B. The Condition of Probation is Not Vague or Indefinite

Petitioner's contention that the condition of probation is so vague and indefinite that it is repugnant to due process is without merit. Neither Cramp v. Board of Public Instruction, 368 U. S. 278, nor Lanzetta v. New Jersey, 306 U. S. 451, cited by petitioner, is factually analagous to petitioner's case.

Cramp involved a Florida Statute which required state employees to execute a written oath in which they were required to swear among other things that they had never lent "aid, support, advise, counsel, or influence to the Communist Party". The Court held that the language quoted, used in the context of the statute was too ambiguous, and the room for its interpretation too broad for a conscientious person to safely execute the oath.

In Lanzetta a state statute, without

proscribing any act or ommission, imposed criminal sanctions against "gangsters". The term was defined in the statute. The definition was held to be vague and uncertain, and the statute was invalidated as being a denial of due process.

Before a statute which forbids the doing of an act fails for uncertainty, its provisions must be so vague the men of common intelligence must necessarily guess at its meaning and differ as to its application. Cramp v. Board of Public Instruction, supra p. 13(emphasis added). The conduct enjoined by petitioner's probationary condition is clearly defined. He is prohibited from fathering illegitimate children whom he is unable to support. There is no restriction on his right to procreate either illegitimate children whom he is capable of supporting or legitimate children.

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In a desperate attempt to force his case within the rule announced in Cramp and Lanzetta, petitioner confuses uncertainties in language used to define the prohibited act, condemned by the Fourteenth Amendment, with uncertainties attendant to a dynamic economy. All who have familial support obligations are subject to the same impredictable forces affecting their ability to meet them about which petitioner fearfully speculates. If petitioner limits his procreative efforts to the marital couch, a place to which he has heretofore been a stranger, he has nothing to fear from the probationary directive.

C. The Condition of Probation Imposed Upon Petitioner Does Not Constitute "Banishment"

Petitioner's incredible suggestion that the restriction complained of

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constitutes "banishment" condemned by the Eighth and Fourteenth Amendments demonstrates the paucity of substance to his entire attack.

"Banishment" is punishment inflicted upon criminals which compels them to leave a city, place or county for a specified period of time or for life. Cooper v. Telfair, 4 Dall. 14, 1 L. Ed 721. In Dear Wing Jung v. U. S., 312 F. 2d 74 (9th Cir. 1962), cited by petitioner in support of this contention, defendant was convicted of violating an immigration law; he was sentenced to a term of imprisonment execution of which was suspended for six months on condition that he leave the country.

The distinction between Jung and the present case is clear. There, it was necessary for the defendant to leave the country in order to comply with the

court's directive. Here, in a carefully tailored web of self-serving speculation, petitioner provides himself with the option of complying with the order or leaving the state.

Moreover, nothing petitioner fears will materialize if he confines his paternal instincts to a legally established marital relationship.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that no federal question of substantial importance is raised by this petition for certiorari and it should be therefore denied.

Dated this 1st day of February, 1973.

Respectfully submitted,

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APPENDIX

APPENDIX A

California Penal Code Section 1203.1
(Applicable Portion)

..."The court may impose and require any or all of the above-mentioned terms of imprisonment, fine and conditions and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer, that should the probationer violate any of the terms or conditions imposed by the court in the instant matter, it shall have authority to modify and change any and all such terms and conditions and to reimprison the probationer in the county jail within

the limitations of the penalty of the public offense involved..."

APPENDIX B

California Penal Code Section 270
(Applicable Portion)

"A father of either a legitimate or illegitimate minor child who willfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedical care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment..."

AFFIDAVIT OF SERVICE

All parties to be served have been served.

This is to certify that I have this 2nd day of February, 1973, served a copy of the Brief for Respondent in Opposition to the Petition for Certiorari in the case of Glen Miller Perkins vs. People of the State of California, United States Supreme Court Case No. 72-5125, by depositing in the U. S. mail, first class, postage prepaid, on the following persons.

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